Supreme Court, U.S.
FILED

01-1381 MAR 05 2002

OFFICE OF THE CLERK

No.

IN THE

SUPREME COURT OF THE UNITED STATES

Arthur Thomas Callahan,
Petitioner

v.

The State of Texas

On Petition For Writ Of Certiorari
To The Court of Appeals
Of Texas, Houston (1st District)

PETITION FOR WRIT OF CERTIORARI

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21pp

QUESTION PRESENTED

Whether Petitioner was denied effective assistance of counsel as is required under the Sixth Amendment to the Constitution when his trial attorney engaged in practically no plea bargain negotiations, failed to file any pretrial motions, and advised Petitioner to plead guilty to a first degree felony and presented less than an hour of testimony from defense witnesses before the trial court sentenced Petitioner to sixty years in prison.

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CITED AUTHORITIES

Case on Petition

Callahan v. State, 24 S.W.3d 483 (Tex.App. -- Houston [1st Dist.] 2000)

U.S. Cases

Hill v. Lockhart, 474 U.S. 52, 88 L.Ed.2d 203, 106 S.Ct. 366 (1985).

Strickland v. Washington, 466 U.S. 668, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984).

Citation of Reports

Callahan v. State, 24 S.W.3d 483 (Tex.App. -- Houston [1st Dist.] 2000).

Jurisdiction

The order sought to be reviewed is an opinion delivered by the Texas Court of Appeals on June 22, 2000. Rehearing was denied by that court on July 27, 2000. A Petition for Discretionary Review was denied by the Texas Court of Criminal Appeals on December 5, 2001.

This Court has jurisdiction to review this case because it concerns a matter of federal Constitutional law.

Constitutional Provision

U.S. CONST. amend. VI.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

STATEMENT OF THE CASE

On March 25, 1999, Petitioner pled guilty to two indictments of felony murder and signed a stipulation of evidence without a punishment recommendation by the prosecutor.[1] On June 10, 1999, after a presentence investigation report had been prepared, the trial court sentenced Petitioner to 60 years confinement in the Texas Department of Criminal Justice, Institutional Division on both cases.[2]

A Motion for New Trial was filed by Petitioner on July 12, 1999 in which the issue of ineffective assistance of counsel was raised.[3] On July 28, 1999 the trial court conducted a hearing on the Motion for New Trial, which was subsequently denied.[4]

A Notice of Appeal was filed on July 29, 1999. On appeal to the Court of Appeals of Texas, Petitioner raised the issues of ineffective assistance of counsel and an involuntary plea entered as a result of said ineffective assistance

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[1]C.R. (Clerk's Record) Vol. 1 pp. 20-28. Unless otherwise noted, references to the clerk's record are to Trial Court No. 785475 but contain documents found in the record of both causes.

[2]*Id.* at 32.

[3]*Id.* at 35.

[4]R.R. (Reporter's Record) Vol. 1 pp. 24-25.

of counsel.[5] Petitioner's conviction was affirmed by said court on June 22, 2000 and rehearing by that court was denied on July 27, 2000.[6] On December 5, 2001 a Petition for Discretionary Review was denied by the Texas Court of Criminal Appeals .[7]

Petitioner now files this petition urging the court to consider the issue of whether he was denied his Constitutional right to effective assistance of counsel.

ARGUMENT

In the cases involved in the petition at hand, the Court of Appeals of Texas has decided that it was not ineffective assistance of counsel which was harmful to Petitioner for Petitioner's trial counsel to fail to engage in plea bargain discussions. Further, counsel failed file any pretrial motions of a substantive nature and presented less than an hour of testimony at the sentencing hearing.

An accused is entitled effective assistance of counsel at the plea bargaining process.[8] In the

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[5]*Callahan v. State*, 24 S.W.3d 483 (Tex.App. - Houston [1st Dist.] 2000).

[6]*Id.*

[7]*See infra* Appendix.

[8]*Hill v. Lockhart*, 474 U.S. 52, 88 L.Ed.2d 203, 106 S.Ct. 366, (1985) and *Strickland v. Washington*, 466 U.S. 668,

current case, there was very limited if any pursuit of a plea bargain. According to the prosecutor, only a general discussion of the case was had, and no specific offers were made or sought.[9]

All of the parties involved in the trial proceedings agree that the case involved inflammatory subject matter which could subject the Petitioner to harsh consequences upon sentencing. Apparently, trial counsel for the Petitioner felt there was no defense to the facts of the case as alleged, as no pretrial motions were filed and Petitioner was willing to enter a plea without a recommendation even though he knew the chances of receiving probation were slim and that he could have easily been sentenced to more than 40 years.[10]

Given such a bleak set of circumstances, pursuing a plea bargain was the only reasonable alternative to Petitioner. Petitioner's counsel failed in the only task which could have possibly helped his client. Such effort can only be characterized as ineffective.

While the prosecution might have believed in the strength of its case to the point of not offering a plea bargain, such a position is not believable when such a little amount of work

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80 L.Ed.2d 674, 104 S.Ct. 2052 (1984).
[9]R.R. Vol. 1 pp. 5-14.
[10]C.R. Vol. 1 p. 43.

was done on behalf of Petitioner. The prosecutor was not forced to answer any discovery requests or pretrial motions. No challenges to the indictment were raised, and less than one hour of testimony was presented at the sentencing hearing according to the docket sheets.[11]

Further, it appears that there was never any potential for the case to actually be tried on its merits to determine guilt or innocence, a possibility which is often the most pressing reason for a prosecutor to offer a plea bargain, if for no other reason than to avoid the expense of time and resources to the government.

Moreover, the fact that Petitioner received a 60-year sentence is on its face proof of the harm suffered by Petitioner. Even if the prosecution had only offered a 50-year offer as it claimed was discussed, there is at a minimum a harm of 10 years. Had any actual advocacy taken place on behalf of Petitioner, the difference could have been much more. Petitioner was denied effective assistance of counsel and could likely have had a different result had he received effective assistance of counsel.

In the present case, Petitioner was presented very little assistance of counsel, certainly not the quality or quantity of which could be characterized as effective. As such, this Court should grant this Petition and set forth a

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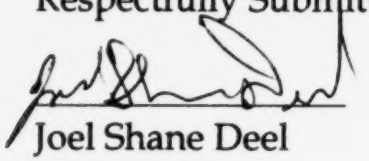
[11]C.R. Vol. 1 p. 52.

ruling on what Petitioner believes is an important question of federal Constitutional law which has been improperly answered by the lower state courts and which is in need of clarification and guidance from this Court.

Respectfully Submitted,



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SEAL OF STATE OF TEXAS

In The Court of Appeals
For The
First District of Texas

No. 01-99-00944-CR
No. 01-99-00945-CR

Arthur Thomas Callahan, Appellant

v.

The State of Texas, Appellee

On Appeal from the 248th District Court
Harris County, Texas
Trial Court Cause Nos. 785475 & 785476

MAJORITY OPINION

Arthur Callahan, appellant, pled guilty to two felony murders, without an agreed recommendation. In three points of error, appellant asserts his guilty plea was rendered involuntary based on ineffective assistance of trial counsel. We affirm.

Procedural Background

The indictments charged that appellant's car struck the two decedents' car while appellant

was fleeing the scene after having committed arson. Appellant entered a guilty plea to both indictments. Following a hearing on the pre-sentence investigation (PSI) report, the trial court sentenced appellant to two concurrent terms of 60-years confinement. After a hearing, the trial court denied appellant's motion for new trial.

Ineffective Assistance of Counsel

A. Settlement Negotiations

In point of error one, appellant contends trial counsel was ineffective because he did not actively pursue settlement discussions with the State. Appellant contends his trial counsel should have actively pursued plea negotiations and told him about any informal discussions that might have been had with the State.

An accused is entitled to effective assistance of counsel during the plea bargaining process. *Ex Parte Battle*, 817 S.W.2d 81, 84 (Tex.Crim.App. 1991). Reasonably effective assistance includes a duty by defense counsel to inform his client of any plea offer by the State. *Ex parte Wilson*, 724 S.W.2d 72, 74 (Tex.Crim.App. 1987).

Trial counsel testifi3ed at the new trial hearing. He said there were no plea negotiations with the prosecutor in appellant's case. Based

on his evaluation of the case, he had little doubt about the outcome if the case went to trial; he felt a trial would result in a conviction and a substantial term of years as punishment. Trial counsel admitted plea negotiations were advisable if a client were willing to accept a reasonable term of years under the circumstances. He felt appellant's case was worth between 20 and 30 years.

Trial counsel could not remember whether any prosecutor set a term of years as an evaluation or "talking point." He admitted he did not convey to appellant any offer, recommendation, evaluation, or term of years. He did not remember that there was anything to convey to appellant, and the prosecutors did not make a specific offer to pass along.

The prosecutor testified at the hearing that, based on her evaluation of the case, if an offer had been made, it would have been at least 50 years; she felt that a conviction and lengthy sentence from either a judge or jury was highly likely; she and trial counsel entered into discussions about the value of the case, but not about specific numbers; she "unequivocally ... never offered ... never discussed 40 years"; she thought the case was worth at least 50 years; she would have tried to get that approved by her division chief if trial counsel had asked her to do so, but trial counsel did not give her an answer; and she never made an offer to trial counsel to

be conveyed to appellant. The prosecutor's file did not contain a written offer.

When asked if she thought it was unusual that consul did not actively seek to bargain, the prosecutor responded in the negative. The prosecutor explained that she was "very vehement" about appellant's case and there was not going to be an offer lower than 50 years. It was her opinion that trial counsel thought there was a possibility of getting less than 50 years from a judge after a PSI hearing.

Assuming, without deciding, that trial counsel was ineffective for not having pursued plea negotiations or conveying plea discussions to appellant, we consider whether appellant established that he was harmed. Applying the usual ineffective assistance of counsel standard for determining harm to situations in which a defendant pled guilty, an appellant must show that, but for counsel's deficient performance, he would not have pled guilty. *See Ex parte Morrow*, 952 S.W.2d 530, 536 (Tex.Crim.App. 1997). Appellant must show, therefore, by a preponderance of the evidence, that he would have refused to enter a plea of guilty, without a recommendation, if his trial counsel had communicated to appellant either the substance of any plea negotiations between his counsel and the prosecutor or his counsel's evaluation of the case.

Appellant claims he would have accepted a 40-year offer. In his affidavit, supporting his motion for new trial, appellant claimed that his trial counsel said the State had made a 40-year offer. The prosecutor denied that a 40-year offer, or any offer, was ever made. The trial court, at the hearing on the motion for new trial, was entitled to believe the prosecutor rather than appellant. The prosecutor was adamant that no offer would be for less than 50 years, even though trial counsel thought the case was worth 20 to 30 years. Even an offer of 50 years would not have been made until approved by the prosecutor's supervisor, and there is no showing that such approval would have been forthcoming. Appellant has not met his burden of proving by a preponderance of the evidence that he was harmed.

We overrule point of error one.

B. Investigation of the facts

In point of error two, appellant contends trial counsel was ineffective because he did not personally investigate the facts of the case. Appellant contends trial counsel never intended to try the case, and, therefore, did not sufficiently investigate the case before appellant entered his guilty plea.

In his motion for new trial and on appeal, appellant contends trial counsel did not

personally conduct an investigation, although he concedes trial counsel met with him for one and one-half hours, and hired a private investigation agency to carry out 15 hours of investigation. A defense attorney is not required to investigate the facts of a case *personally*. Counsel may delegate the investigation to a private investigator. Appellant has not met his burden of showing trial counsel's actions were deficient.

We overrule point of error two.

C. Motion to quash

In point of error three, appellant contends trial contends trial counsel was ineffective because he did not file a motion to quash the indictments. Appellant contends the indictments could have been quashed because they did not identify the name of the complainant of the arson, which formed the aggravating factor of the felony murder charges.[12] Both indictments read as follows:

> [Appellant], on or about June 13, 1998, did then and there unlawfully, intentionally and knowingly COMMIT the felony offense of MURDER by STARTING A FIRE WITH THE

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[12] The arson complainant was not one of the decedents.

INTENT TO DESTROY AND DAMAGE A BUILDING AND THE DEFENDANT WAS RECKLESS ABOUT WHETHER THE BURNING WOULD ENDANGER THE LIFE OF A PERSON AND THE SAFETY OF PROPERTY OF ANOTHER, and while in the course of and furtherance of the IMMEDIATE FLIGHT FROM THE COMMISSION OF said offense did ATTEMPT TO COMMIT an act clearly dangerous to human life, to wit: FAIL TO TURN ON HIS VEHICLE'S HEADLIGHTS AND CAUSING HIS VEHICLE TO STRIKE THE VEHICLE IN WHICH THE COMPLAINANT RODE and did thereby cause the death of [the decedent].

On appeal, appellant contends he pled guilty to indictments that did not give him precise notice of the arson or protect him on double jeopardy grounds from a future arson prosecution.

1. Sufficient notice

Assuming that trial counsel should have filed a motion to quash the indictments,

appellant has not shown he was harmed by counsel's error. Appellant does not assert he did not know which building was the subject of the arson. He does not complain that the physical location of the building was not mentioned in the indictments, or that he did not know its location. Appellant does not explain how knowing the building owner's identity would have affected his guilty plea, and he does not contend he might not have pled guilty if he had known the owner's identity. Appellant has not met his burden of proving by a preponderance of the evidence that he was prejudiced by counsel's performance.

2. Double jeopardy

Other than appellant's conclusory statement hat he was denied double jeopardy protection because the indictments did not identify the building owner, appellant provides no support for his argument. He does not explain how knowing the building owner's identity would have provided him with double jeopardy protection.[13] Appellant does not

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[13]Appellant relies on *King v. State*, 594 S.W.2d 425, 426 (Tex.Crim.App. 1980), in which the court held, "It is clear that when criminal conduct, constituting an aggravated feature of an offense may be directed at a person other than the ultimate victim of the

explain how the State could successfully prosecute him in a separate arson trial. Appellant has not met his burden of proving by a preponderance of the evidence that he was prejudiced by any deficient performance of counsel.

We overrule point of error three.

CONCLUSION

We affirm the judgement of the trial court.

/s/ Tim Taft
Justice

Panel consists of Justices O'Connor, Taft, and Smith.[14]

Justice O'Connor dissenting.

Publish. Tex. R. App. P.47

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crime alleged, the specification of that person is a fact to which the accused is entitled should he request it by timely filed written motion tot quash." In *King*, the allegation of such a fact was required to distinguish the conduct alleged from other conduct by the defendant, and thereby insure a bar to a subsequent prosecution for the same offense. *Id.*

[14]The Honorable Jackson B. Smith, Jr., retired Justice, Court of Appeals, First District of Texas at Houston, participating by assignment.

SEAL OF STATE OF TEXAS

THE COURT OF CRIMINAL APPEALS OF TEXAS

DECEMBER 5, 2001

The following orders are entered and opinions handed down:

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Appellant's petition for discretionary review refused:

1715-00 Callahan, Arthur Thomas Harris County 01-99-00944-CR

1716-00 Callahan, Arthur Thomas Harris County 01-99-00945-CR[15]

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[15]This information was also delivered to Petitioner and the Court of Appeals via a postcard in each case.